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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-295

EILEEN RAFFERTY, et al.,

*Appellants,*

vs.

JOHN MARCIN,

*Appellee.*

## JURISDICTIONAL STATEMENT

RICHARD J. TROY
180 N. LaSalle Street
Suite 1405
Chicago, Illinois 60601
(312) 236-0020

*Attorney for Appellants*

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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## JURISDICTIONAL STATEMENT

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## OPINION BELOW

On May 26, 1977, the Illinois Supreme Court denied, without opinion, the Petition for Leave to Appeal filed in this cause.

The Opinion of the Appellate Court of Illinois, First District, is not yet officially reported. It is reproduced in Appendix A to this Jurisdictional Statement.

## JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The proceedings below involved challenges to the constitutionality of the Illinois Local Referendum Law (Ill. Rev. Stat. 1973, Ch. 43, Art. IX), which permits the revocation of licenses to sell alcoholic beverages at retail, including beer and wine with meals, by a referendum in a narrow segment of the community.

The basis of the challenges included repugnance of the statute to the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, as well as similar provisions of the State's Constitution. The validity of the statute was upheld by the state courts. Thus, jurisdiction is predicated upon the provisions of 28 U.S.C. § 1257(2).

If, however, this Court does not consider appeal as the proper mode of review, Appellants request that the papers filed herein be regarded and acted upon as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103.

## JUDGMENTS BELOW

On December 30, 1976, the Illinois Appellate Court, First District, entered its judgment declaring the Illinois Local Option Law valid. (Said judgment is contained in Appendix A to this Statement.)



On May 26, 1977, the Illinois Supreme Court denied a Petition for Leave to Appeal, by publication and without opinion. A copy of the notice of said action is contained in Appendix C.

On June 16, 1977, Appellants timely notified the Appellate Court of Illinois, First District, of their intention to seek review in this Court, and a stay of the mandate from that court is automatic upon such notice, pursuant to Ill. Sup. Ct. Rule 368(a).

## CASES BELIEVED TO SUSTAIN JURISDICTION

In the case at bar, the Illinois Supreme Court denied Appellant's Petition for Leave to Appeal. It has long been held that when review to the highest state court is by way of leave, and a petition for such leave is denied, the denial is a final judgment which can be the basis of proceedings under the appellate jurisdiction of this Court. *Gregory v. McVeigh*, 90 U.S. 294, 306, 23 Wall. 294, 23 L. Ed. 156 (1875).

Furthermore, when Appellants have urged below that the law in question or its application infringes constitutionally protected rights, and those contentions have been rejected by the highest court in the state in which review can be had, it is proper to invoke this Court's jurisdiction by way of appeal. *Cohen v. California*, 403 U.S. 15, 18, 91 S. Ct. 1790, 29 L. Ed. 2d 284 (1971), *rehearing denied*, 404 U.S. 876, 30 L. Ed. 2d 124; citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

## STATUTES INVOLVED

This case involves the validity of the Illinois Local Referendum Law, also known as the Local Option Law. This statutory scheme for local referenda on retail sales of alcoholic beverages is found in Article IX of the Illinois Liquor Control Act (Ill. Rev. Stat. 1973, ch. 43, pars. 166-182). Paragraphs 166, 167 and 168 of this Article contain the substantive portions of the challenged law; the remaining paragraphs deal with the procedural mechanics of the referendum.

Due to their length, said paragraphs 166-68 are reproduced in Appendix B to this Statement.

## QUESTIONS PRESENTED

1. Whether local referenda of the type approved by this Court in *James v. Valtierra*, 402 U.S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971), and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976), are valid if restricted to a limited, narrow segment of the community.

2. Whether the principle of one man, one vote mandated by this court in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), applies to such local referenda.



## STATEMENT OF THE CASE

This case involves a challenge to the Illinois Local Referendum Law which permits voters in a precinct to determine if alcoholic beverages can be sold in the precinct. This designation of the precinct as the relevant community for such referendum applies only to precincts in a city or town with over 200,000 population. In all other municipalities in the State, the relevant community is designated as the entire city or town voting as a unit.

Under Illinois law, a precinct is a geographical unit containing, as near as practicable not less than 400 and not more than 600 registered voters. Community of interest and population are not considered in the drawing of election precincts, nor in the redrawing of them to reflect shifts in the number of registered voters.

The City of Chicago, in which the case at bar arose, is divided into fifty wards, which wards are drawn in conformance with the one man, one vote principle and contain approximately 65,000 population each. Within each ward, the precinct boundaries are adjusted to some extent almost every year.

Appellants challenged the designation of the precinct as the voting unit for a referendum on the grounds that the precincts precluded all the people in a community from voting on the question; that the precincts are a limited, narrow segment of the community that can be gerrymandered to reflect only a specific point of view, and that the use of the precinct for referenda violates the principle of one man, one vote.

In upholding the trial court's dismissal of Appellants' complaint, the Illinois Appellate Court ruled that the use of the precinct in cities and towns over 200,000 population was a proper classification, and that the requirements of one man, one vote did not apply to such local referenda.

Appellants' Petition to the Illinois Supreme Court for Leave to Appeal from the decision of the Appellate Court was denied without opinion.

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

### I.

### LOCAL REFERENDA, TO BE VALID, MUST PERMIT ALL PERSONS IN THE AFFECTED COMMUNITY THE RIGHT TO VOTE ON THE ISSUE.

In *James v. Valtierra*, 402 U.S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971), this Court sustained the use of a local referendum to give citizens a voice on questions of public policy. At issue in *James v. Valtierra* was the question whether public housing should be constructed within the city. Mr. Justice Black, speaking for the Court in that case said:

> "This procedure ensures that *all the people* of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services. . . ." (143 91 S. Ct. at 1334; emphasis added.)

The use of a local referendum was approved when applied to rezoning questions in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976). The emphasis of the Court's opinion was that a referendum was a "classic demonstration" of democracy (426 U.S. at 679).



However, the Court reaffirmed its refusal to sanction such local referenda when it was restricted to a limited, narrow segment of the community. In discussing *Eubank v. City of Richmond*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928), the Court stated:

> "The thread common to both decisions is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a *narrow segment* of the community, not to the people at large."
>
> * * * *
>
> "Neither *Eubank* nor *Roberge* involved a referendum procedure such as we have in this case; the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decision-making by the people through the referendum process." *City of Eastlake v. Forest City Enterprises, Inc.*, (426 U.S. at 677, 678, 96 S. Ct. at 2364)

The limited, narrow segment of the community approach to a referendum criticized by the Court in *City of Eastlake* is precisely the type of referendum sanctioned by the Illinois Local Referendum Law challenged in the case at bar.

Although the make-up of a precinct may vary from state to state, a "precinct" is defined in the Illinois Local Referendum Law as "any part of a city, village or incorporated town over 200,000 population which was a 'voting precinct' or an 'election precinct' for voting at the

last general election." (Ill. Rev. Stat., 1973, ch. 43, par. 166). An election precinct is described as a geographical area containing as near as practicable 400 qualified voters, and not more than 600 (Ill. Rev. Stat., 1973, ch. 46, par. 11-3).

As a matter of practice, the boundaries of city election precincts are altered from time to time to reflect shifts in the number of voters in a precinct. For example, the precinct involved here was changed from precinct # 90 to precinct # 29 to precinct # 6 and four blocks were added to its southern extremity. In none of such changes were the factors of community of interest or population considered (Excerpts From Record, pp. C-17, 18).

Thus, the area in which the local referendum is conducted does not represent a "community" in any sense of the term, but only a convenient device for the administration of elections. If such an artificially created area as a city election precinct can be designated for the conduct of local referenda, small, isolated parts of a city could effectively screen what housing, businesses, etc., would be permissible in their enclaves.

Furthermore, persons who are, in fact, part of the community, as that term is customarily used, are excluded from voting at all. Persons within the same city, the same ward, but across the street are precluded from voicing their opinion on issues that concern them and the community at large.

Rather than being a "classic demonstration" of democracy, local referenda in a city precinct will become a classic demonstration of local prejudices prohibiting the free exercise of the rights of others. It is respectfully submitted that the Federal Constitution de-



mands that the propriety of uses within a municipality not be subject to the whim and caprice of a limited and narrow group of voters.

## II.

## LOCAL REFERENDA MUST ADHERE TO THE PRINCIPLE OF ONE MAN, ONE VOTE.

Under the mandate of *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), and its progeny, the principle of one man, one vote is firmly established as the *sine qua non* of electoral due process.

One man, one vote means that every person entitled to vote on a question must have equal opportunity to affect the outcome of the election by the casting of his vote. This, of course, applies as well to local government. See *Avery v. Midland County, Texas*, 390 U.S. 474, 88 S. Ct. 114 (1968).

By limiting the persons entitled to vote to voters in a precinct, those voters in the community, but not in the particular precinct, have not just a diminished voting power, but none at all. If a voting scheme were devised that permitted voters in one precinct to vote twice, or have their votes weighted by a multiple factor of 3 or 4, no one would seriously defend the practice.

The community, not the precinct, is the relevant area and within that area some persons can vote and others cannot. This procedure violates the principle of one man, one vote. *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Hadley v. Junior College District*, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970).

Significantly, Chicago's fifty wards are drawn in conformance with the one man, one vote principle. See *Cousins v. City of Chicago*, 322 F. Supp. 428 (N.D. Ill. 1971), *rev'd on other grounds*, 422 F. 2d 830 (1972).

By designating the ward rather than the precinct as the relevant area, the principle of one man, one vote would be adhered to.

The Illinois Local Referendum Law violates the Federal Constitution and, therefore, constitutes a denial of due process, equal protection and fundamental due process. Appellants submit such violations require its invalidation.

## CONCLUSION

For all of the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

RICHARD J. TROY
180 N. LaSalle Street
Suite 1405
Chicago, Illinois 60601
(312) 236-0020

*Attorney for Appellants*



# APPENDIX A

### Opinion Of The Appellate Court

MR. JUSTICE SULLIVAN delivered the opinion of the court:

A local option election was held in the 6th Precinct of the 19th Ward of the City of Chicago, pursuant to the provisions of section 2 of article IX of the Illinois Liquor Control Act (the Act). (Ill. Rev. Stat. 1973, ch. 43, par. 167.) In this election, a majority voted to prohibit the sale of alcoholic liquors at retail. Petitioners, voters residing in the precinct, brought suit contesting the validity of the election results and challenging the constitutionality of the Act. Respondent's motion to dismiss was granted and, on appeal, petitioners contend (1) that a Chicago precinct is an invalid unit for elective determinations because it is drawn in violation of the "one man-one vote" mandate of the United States Supreme Court; and (2) that the designation of the precinct as a decision-making unit in cities of over 200,000 is an arbitrary and capricious classification.

OPINION

The record discloses that during the discovery phase of this proceeding, respondent admitted that the criteria used in establishing precinct boundaries were the "natural, geographic and legislative boundaries and the number of registered voters." The population of the precinct was unknown, and it is clear that boundaries were drawn without regard to the general population of the precinct or of other surrounding precincts. Petitioners argue that such disregard for population violates the principle of "one man-one vote" when precincts are utilized as the unit of election.

*Baker v. Carr* (1962), 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, and its progeny have held that, as nearly as is practicable, one man's vote is to be worth as much as another's. Since *Baker*, the concept of "one man-one vote" has been applied to cases involving elections of federal, state and local officials. (*Wesberry v. Sanders* (1964), 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526; *Reynolds v. Sims* (1964), 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362; *Avery v. Midland County* (1968), 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114.) In *Hadley v. Junior College District* (1970), 397 U.S. 50, 56, 25 L.Ed.2d 45, 50-51, 90 S.Ct. 791, 795, the supreme court reviewed the numerous decisions involving the rule and summarized them as follows:

> "* * * [A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."

The instant case, however, does not involve an election which selects persons to perform governmental functions; nor does it involve members of an elective body who are chosen from separate districts. In issue here is a decision-making election wherein the voters of a geographically defined area determine whether a law enacted by the legislature should become operative within the district. See *Malito v. Marcin* (1973), 14 Ill. App.3d 658, 303 N.E.2d 262 (*appeal dismissed* 1974), 417 U.S. 963, 41 L.Ed.2d 1135, 94 S.Ct. 3165, where it was held that while a legislature may not delegate legislative functions to be exercised by another person or



group of persons, it may enact laws which will become operative upon the affirmative vote of the people of the district to be affected, provided the law contains a complete declaration of the legislative will.

No contention is made here that the Act does not fully declare the legislative will. Petitioners contend only that a local option election at the precinct level violates the "one man-one vote" requirement. They have failed, however, to cite any authority where the principle has been extended to the situation that we have here; namely, where the voters were not asked to decide what the law should be within the precinct but whether the law already enacted by the legislature should become operative within that precinct. We have been unable to find any such authority, but we note that the Illinois Supreme Court has specifically held that the concept is inapplicable to a decision-making election. (*In re Natural Resources Development Bond Act* (1970), 47 Ill. 2d 81, 264 N.E.2d 129.) There, the court stated "* * * that the equal-protection clause requires that in selecting a representative in government, votes may not be debased and voters may not be 'fenced out' because of 'invidious' distinctions" (47 Ill.2d at 86, 264 N.E.2d at 131-132) and, in refusing to enlarge the "one man-one vote" rule, the Illinois Supreme Court said, "* * * the Supreme Court of the United States has never extended the concept of 'one man-one vote' to decision-making elections but rather has specifically applied said concept to the selection of persons by popular election to perform governmental functions." 47 Ill.2d at 87, 264 N.E. 2d at 132.

In the instant local option election, we are concerned with a decision-making election in which no voter within the precinct was excluded from participation and all the voters were residents of the precinct, and their decision

prohibited the sale of intoxicating liquor only in the precinct. In view of the foregoing, we reject plaintiff's argument that the election was violative of the "one man-one vote" mandate.

Petitioner's second contention is that the designation of the precinct as a decision-making unit in cities with a population in excess of 200,000 is arbitrary and capricious. He argues that no rational basis exists for the classification between cities of less than 200,000 and the precinct vote in Chicago; and, thus, that it is in violation of the equal-protection clause of the fourteenth amendment. We disagree. This same argument has been raised before, and it has been held that the provisions of the Liquor Control Act, establishing the precinct as an area for the determination of local option questions in cities over 200,000 is a proper classification. See *Anderson v. Nick* (1949), 402 Ill. 508, 516, 84 N.E.2d 394, 398, where the court stated:

> "In the case at bar it appears that a majority of the voters in the precinct * * * have voted in favor of said territory being wet. We believe that the provisions of the statute establishing the precinct as an area for determination of local option questions in cities of over 200,000 is a proper classification * * *."

See also, *Malito*, where at page 660 it was stated that the use of a precinct as the geographical area for the determination of local option elections, pursuant to the provisions of the Act involved here, was reasonably appropriate and constitutional.

For the reasons stated, the judgment dismissing plaintiff's complaint is affirmed.

Affirmed.

LORENZ, P.J. and DIERINGER, J. concur.



# APPENDIX B

The following sections of Article IX, Local Referendum, of the Illinois Liquor Control Act (also sometimes referred to as the "Dram Shop Act") is pertinent to this case.

ARTICLE IX, LOCAL REFERENDUM

**Ill. Rev. Stat. 1973, Ch. 43, Par. 166**

**166. Terms defined.]** § 1. The words and phrases defined in this section and used in this Article, unless inconsistent with the context, shall be construed as follows: "Precinct" means any part of a city, village or incorporated town of over 200,000 population which was a "voting precinct" or an "election precinct" for voting at the last general election.

"Political subdivision" means a township, road district, city, village or incorporated town, as the case may be.

"Legal voter", insofar as the signing of a petition for a local option election is concerned, means a person whose name appears on the poll list of the last general election of county or state officers.

"Annexed area" means a territory which has attached to and become a part of a different political subdivision or precinct. The term shall be an appropriate designation only until the area to which it attaches holds a referendum hereunder.

"Disconnected area" means a territory which has detached or separated from a political subdivision or precinct.

In the phrase, "Shall the sale at retail of alcoholic liquor (or alcoholic liquor other than beer containing not more than 4% of alcohol by weight) (or alcoholic liquor containing more than 4% of alcohol by weight except in the original package and not for consumption on the

premises) be prohibited in .....?" the proper name, whether of a "township", "road district", "precinct", "city", "village" or "incorporated town" shall be understood to be inserted in the blank, and the same shall be inserted in the petitions filed by and the ballots prepared for the voters of any precinct, township, road district, city, village or incorporated town.

"Clerk", with reference to cities, villages and incorporated towns, and precinct situated therein, means the town, city or village clerk, as the case may be; with reference to road districts in counties not under township organization, it means the road district clerk; with reference to townships or parts of townships lying outside of cities, villages and incorporated towns in counties under township organization, it means the township clerk.

"Election" as used in reference to cities, villages and incorporated towns, means an election at a time fixed by law for choosing city, village or incorporated town officers. "Election" also means an election at a time fixed by law for choosing county, township or road district officers.

In case an election is to be held for officers of the city, village, incorporated town, township, or road district to which a proposition requested pursuant to this Article shall be submitted, or for the election of officers of a township or road district in which it is requested that such proposition be submitted to that part of a township or road district lying outside the corporate limits of a city, village or incorporated town, not less than 60 days nor more than 6 months following the filing of such petition, then the words "next ensuing election" as used herein shall mean the next ensuing election for officers of such city, village, incorporated town, township or road district, regardless of any intervening elections at which residents of such city, village, incorporated town, township or road district may vote. As amended by act approved Aug. 7, 1963. L.1963, p. 2516.



## Ill. Rev. Stat. 1973, Ch. 43, Par. 167

When any legal voters of a precinct in any city, village or incorporated town of more than 200,000 inhabitants, as determined by the last preceding Federal census, desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in the precinct, they shall, at least 60 days before an election, file in the office of the clerk of such city, village or incorporated town, a petition directed to the clerk, containing the signatures of not less than 25% of the legal voters registered with the board of election commissioners or county clerk, as the case may be, from the precinct. The petition shall request that the proposition "Shall the sale at retail of alcoholic liquor be prohibited in .....?" be submitted to the voters of the precinct at the next ensuing election at which such proposition may be voted upon. The submission of the question to the voters of such precinct at such election shall be mandatory when the petition has been filed in proper form with the clerk. Notice of the filing of the petition and the result of the election shall be given to the Secretary of State at his offices in both, Chicago and Springfield, Illinois. A return of the result of the election shall be made to the clerk of the city, village or incorporated town in which the precinct is located. If a majority of the voters voting upon such proposition vote "YES", the sale at retail of alcoholic liquor shall be prohibited in the precinct.

In cities, villages and incorporated towns of 200,000 or less population, as determined by the last preceding Federal census, the vote upon the question of prohibiting the sale at retail of alcoholic liquor, or alcoholic liquor other than beer containing not more than 4% of alcohol by volume, or alcoholic liquor containing more than 4% of alcohol by weight in the original package and not for consumption on the premises, shall be by the voters of the political subdivision as a unit. When any legal voters of such a city, village or incorporated town desire to pass upon the question of whether the sale at retail of

alcoholic liquor shall be prohibited in the municipality, they shall, at least 60 days before an election, file in the office of the clerk of the municipality, a petition directed to the clerk, containing the signatures of not less than 25% of the legal voters registered with the board of election commissioners or county clerk, as the case may be, from the municipality. The petition shall request that the proposition, "Shall the sale at retail of alcoholic liquor be prohibited in .....?" be submitted to the voters of the municipality at the next ensuing election at which the proposition may be voted upon. The submission of the question to the voters of the municipality at such election shall be mandatory when the petition has been filed in proper form with the clerk. Notice of the filing of the petition and the result of the election shall be given to the Secretary of State at his offices in both Chicago and Springfield, Illinois. A return of the result of the election shall be made to the clerk of the city, village or incorporated town. If a majority of the voters voting upon the proposition vote "YES", the sale at retail of alcoholic liquor shall be prohibited in the municipality.

In the event a municipality does not vote to prohibit the sale at retail of alcoholic liquor, the council or governing body shall ascertain and determine what portions of the municipality are predominantly residence districts. No license permitting the sale of alcoholic liquors shall be issued by the local liquor commissioner or licensing officer permitting the sale of alcoholic liquors at any place within the residence district so determined, unless the owner or owners of at least two-thirds of the frontage, 200 feet in each direction along the street and streets adjacent to the place of business for which a license is sought, file with the local liquor commissioner or licensing officer, his or their written consent to the use of such place for the sale of alcoholic liquors.

When in such city, village or incorporated town Articles 6, 14 and 18 of "The Election Code", approved May 11, 1943, as heretofore or hereafter amended, are effective, then the clerk with whom the petition is filed shall deliver the petition, together with a certificate of the filing, to the board of election commissioners of the city, village or incorporated town, and the board shall conduct the election upon the proposition requested by the petition submitted in accordance with the provisions of "The Election Code".



* * *

**Ill. Rev. Stat. 1973, Ch. 43, Par. 168**

**168. Date referendum result is operative.**] § 3. A vote under the provisions of this Act, shall become operative on the thirtieth day after the day of the election at which such vote is cast.

# APPENDIX C

49325

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

CLELL L. WOODS
CLERK

TELEPHONE
AREA CODE 217
782-2035

May 26, 1977

Mr. Richard J. Troy
Attorney at Law
Sneider and Troy
180 North LaSalle Street
Chicago, Illinois 60601

No. 49325 - Eileen Rafferty, et al., petitioners, vs. John Marcin, City Clerk of the City of Chicago, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court